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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

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SAUL TURNOF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, Saul Turnof, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 27, 1972, affirming petitioner's conviction in the United States District Court for the Southern District of New York (Appendix A, *infra*, p. 11).

Opinions Below

No opinion was rendered by the Court of Appeals or by the District Court.

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

Statute Involved

The information upon which petitioner was tried and convicted alleges a violation of Section 7203, Title 26, United States Code, which provides:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

Questions Presented

1. Did the trial court's charge deprive defendant of a fair trial?

2. Did the government establish beyond a reasonable doubt the requisite willfulness and criminal intent?

Statement

Petitioner's conviction in the United States District Court for the Southern District of New York for failing to file returns for employees' federal income taxes withheld and Federal Insurance Contribution Act taxes (F.I.C.A.), referred to herein as 941 returns, was affirmed by the Court of Appeals for the Second Circuit, without opinion.

The information filed against petitioner contained 13 counts and charged that, as a partner in Jacob Turnof & Sons and as an employer of labor, he "unlawfully, wilfully and knowingly did fail to make and file returns" for income taxes withheld, F.I.C.A. taxes and unemployment taxes which he was under a duty to make and file. Counts 11, 12 and 13, relating to unemployment taxes were withdrawn at the start of the trial. Petitioner was tried on counts 1 through 10, inclusive, which charged him with failing to make and file 941 returns for the last 3 quarters of 1966, the four quarters of 1967 and the last 3 quarters of 1968.

As part of the government's case three witnesses testified that they were employed as painters by the firm of J. Turnof & Sons during 1966, 1967 and 1968, "off and on", according to availability of work, and that petitioner paid them their wages, after deductions for income taxes and F.I.C.A. taxes. Petitioner's brother testified that he and his brother are painters and partners in the firm of J. Turnof & Sons and that petitioner handled the firm's payrolls in 1966, 1967 and 1968.

Brian M. Bruh, a special agent with the Intelligence Division of the Internal Revenue Service, testified that in June 1968 he was assigned to investigate whether J. Turnof & Sons filed 1941 returns for past quarterly periods. His search of the Internal Revenue Service files revealed that the firm did not file such returns for the last 3 quarters of 1966, the four quarters of 1967 and as subsequently revealed, the last 3 quarters of 1968. He testified that petitioner acknowledged that it was his responsibility in the firm to prepare and file tax returns and that he had prepared W2 forms for each employee reflecting the amount of wages earned and taxes withheld. He further testified that petitioner supplied him with the firm's payroll records, ledger sheets, cancelled checks, bank statements and W2 forms for the period covered by the information and also

supplied him with his and his wife's personal income tax returns, bank statements and cancelled checks. He also testified that petitioner stated that he believed that the last form 941 filed for Jacob Turnof & Sons was for the first quarter of 1964.

Proof was offered which showed a levy by the government on the bank account of J. Turnof & Sons on December 20, 1965, allegedly for the last three quarters of 1964, and that $5,234.50 was taken by the government on said levy. On September 20, 1966, the government again levied on the bank account of J. Turnof & Sons and took $9,758.86, allegedly for the four quarters of 1965 and the first quarter of 1966.

Petitioner testified that J. Turnof & Sons are painting contractors. The business was started by his father, Jacob Turnof, and after his father's death in 1961, he and his brother Abe continued the business as partners. In good years the firm has 4 or 5 employees and less in slow years. Petitioner testified that he does painting when he has time. "The estimating, pricing, collections and so on, falls mainly on me". He handled the firm's bookkeeping during evening hours after the day's work.

In connection with the levies of December 1965 and September 1966, under which the government seized $14,993.36 from the bank account of J. Turnof & Sons, petitioner testified: "Well, Mr. Bruh also mentioned about the levies, and I said that the government has more money from me than is coming to them. I have money coming from the government", and that Mr. Bruh told him: "It makes no difference if you pay up or not. I am here to press—for a criminal charge."

Petitioner, in response to the question "* * * did any of the people from IRS tell you that they were going to fill out your 941s and they were going to assess you them-

selves, that is that they were going to do it for you", stated: "Well they did fill out prior to 1966", "and they assessed", "and they sent me the forms, which I have to correct, of course, I have to adjust". And, in answer to the question "In 1965 didn't a representative of the Internal Revenue fill out the 941s for you and assess you", petitioner stated: "Yes".

Reasons for Granting the Writ

I. The trial court's charge as to the following matters deprived petitioner of a fair trial. It, in effect, directed the jury not to consider the defenses offered.

The defense established that petitioner was confused and not aware of his obligation to file the required returns as the government had levied and collected on December 20, 1965 and September 20, 1966, a total of $14,993.36. After the first levy the Internal Revenue Service agent prepared the required returns and had the petitioner sign them. The petitioner was under the impression that after the levy of September 20, 1966, the government would follow the practice it followed after the levy of December 20, 1965, and prepare the required returns. In referring to this contention the court charged:

> "The fact that the Internal Revenue Service may have collected too much from the firm of Jacob Turnof and Sons Company for years prior to 1966 is *no excuse* for not filing for the years 1966 through 1968." (emphasis added)

It is respectfully submitted that this charge foreclosed consideration by the jury of all the elements and matters which the government must establish beyond a reasonable doubt in order to obtain a conviction under Section 7203, such as intentional, deliberate and purposeful failure to file with the deliberate intention to evade the duty to file.

The foregoing charge also prevented consideration by the jury of the prior practice of the government in dealing with petitioner, which created a state of mind or impression upon him that the government would follow the same practice for the quarters mentioned in the information.

In *United States* v. *Murdock*, 290 U.S. 389, 396, this Court held:

> "He whose conduct is defined as criminal is one who '*willfully*' fails to pay the tax, to make a return, to keep the required records, or to supply the needed information. Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances, must be willful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information."

Petitioner established a good faith defense "as to his duty to make a return" by proving the practice followed by the government after the first levy, and the excessive collections on the two levies. The trial court's charge that the prior action of the government was "no excuse for not filing" in effect instructed the jury to disregard the defense and to find defendant guilty.

The trial court also erred in charging the jury on the issue of willfulness. The court charged:

> "In short, the element of wilfulness as used in this statute involves a specific wrongful intent, *mainly* actual knowledge of the existence of a legal obligation and the intent to evade that obligation or not perform it, and if you cannot find that intent, less than that should be considered a mistake or inadvertence or carelessness." (emphasis added)

Under this charge the jury was not limited to the need to prove actual knowledge of the obligation to file and the intent to evade or not perform that obligation, but was permitted to speculate and to consider unspecified matters and elements in determining "wilfulness". For petitioner to have a specific wrongful intent there must be actual knowledge of the existence of the legal obligation to file and the intent to evade that obligation, and, not as the court charged "mainly" actual knowledge and the intent to evade.

In the Court of Appeals the government argued "that the presence of the word 'mainly' instead of 'namely' in the transcript may well be a reporter's error given the closeness in sound of the two words and that 'namely' would have more meaning in the context where 'mainly' now appears." It is submitted that this argument is specious and speculative. It may well be, and it most likely is the fact, that the reporter did not err in transcribing the charge but that the trial court erred in using a word that permitted the jury to speculate and draw its own conclusions as to the degree and quantum of proof necessary to establish a wrongful intent. The trial court's error in charging the jury as to the elements of willfulness as used in Section 7203 deprived petitioner of a fair trial.

II. The government failed to prove beyond a reasonable doubt the requisite willfulness and criminal intent of defendant in failing to file the 941 returns mentioned in the counts of the information.

In *United States* v. *Murdock, supra,* at page 394, the Court stated with reference to the word willful:

> "But when used in a criminal statute it generally means an act done with a bad purpose * * * without justifiable excuse * * *; stubbornly, obstinately, perversely, * * *."

The proof established that petitioner did not act stubbornly, obstinately, perversely, or with a bad purpose. He did not have an evil motive in not filing. He had reasonable cause and justifiable excuse for believing that his acts were lawful, due to the prior conduct of the government which lulled him into a sense of believing that the government would follow the same procedure for the periods covered in the counts of the information as it followed shortly prior thereto, which the jury undoubtedly did not consider because of the trial court's charge.

The petitioner did not hide anything from the government. He was extremely cooperative and gave the government agents free access to all his books and records, including his and his wife's personal income tax returns. He had no secret bank accounts and no income which was not reflected in his books and records. At no time did he evade or attempt to evade payment of taxes due. He supplied his employees with W-2 forms which reflected all the information called for, such as wages earned, deductions for social security, unemployment insurance and income taxes. This cooperation by petitioner showed lack of willfulness.

The proof established that petitioner did not evade the obligation to file because of any criminal intent, but by reason of the nature of his business and the prior practices and procedures of the Internal Revenue Service. The jury's verdict was, therefore, clearly contrary to the evidence.

III. Certiorari should be granted because of conflicts between decisions of Courts of Appeals for the Second and Third Circuit as to the degree of proof necessary to establish "willfulness" under Section 7203.

In *United States* v. *Vitiello*, 363 F.2d 240, 242, the Court of Appeals for the Third Circuit held:

> "Our affirmative statements of the meaning of 'willfulness' in section 7203 or its predecessor clearly

exclude any type of carelessness or negligence, however inexcusable. Thus, in the Palermo case we said:

"Willfulness is an essential element of the crime proscribed by [the misdemeanor section]. . . . It requires existence of a specific wrongful intent—an evil motive—at the time the crime charged was committed. . . . Mere laxity, careless disregard of the duty imposed by law, or even gross negligence, unattended by 'evil motive' are not probative of 'willfulness'". 259 F2d at 882.

* * * * * *

"It follows that it was error in this case to instruct the jury that it might find 'willfulness' within the meaning of section 7203 in conduct characterized by merely careless disregard of legal obligation or in acts that were merely capricious or not justified by any reasonable belief in their legality.

We have not overlooked the fact that the defendant did not except to the erroneous portions of the charge. However, we think the language of the charge constituted 'plain error' of a prejudicial sort, which a reviewing court may and should correct as authorized by the saving clause of Rule 52(b), Federal Rules of Criminal Procedure, * * *." (p.243)

In *United States* v. *Platt*, 435 F.2d 789, 794, the Court of Appeals for the Second Circuit, after quoting from its decision in *United States* v. *Schipani*, 362 F.2d 825, 831, that "willfully under § 7203 calls only for proof that the taxpayer failed to file his return intentionally and knowingly and not through accident or mistake or other innocent cause", stated:

> "To such extent as other circuits may require something more, their struggles to define just what the more is would not encourage us to emulate them, even if we entertained greater doubt on the subject than we do."

In *United States* v. *Schipani, supra,* relied upon by the Court of Appeals for the Second Circuit, this Court denied certiorari in 385 U.S. 934, and thereafter vacated the order denying certiorari and granted certiorari and vacated the judgment of the United States Court of Appeals for the Second Circuit and remanded the case to the District Court for new trial, 385 U.S. 372.

In view of the conflict between the Courts of Appeals for the Second and Third Circuits as to the proof necessary to establish "willfulness" under § 7203, it is respectfully submitted that certiorari should be granted to resolve such conflict.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH KAPLAN
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New York, New York 10022

Judgment of Affirmance.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of November, one thousand nine hundred and seventy-two.

Present: HON. HENRY J. FRIENDLY
Chief Judge

HON. STERRY R. WATERMAN
HON. PAUL R. HAYS
Circuit Judges,

72-1976

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SAUL TURNOF,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro,
Clerk

By: Vincent A. Carlin
Chief Deputy Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-917

SAUL TURNOF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of failing to file Employer's Quarterly Tax Returns (Forms 941) in ten of the eleven quarters between April 1, 1966, and December 31, 1968, in violation of 26 U.S.C. 7203. He was fined $2,000 and sentenced to nine months' imprisonment.

Petitioner, who holds a college degree in accounting (R. 227a, 261a),[1] was a partner in the painting business of Turnof and Sons and was responsible for recording and disbursing wages and filing the tax returns of the business (R. 31a-33a, 40a, 60a, 124a, 263a). Petitioner filed Forms 941 for the quarters between January 1, 1962 and March 31, 1964 (R. 89a, 264a-267a). He did not file Forms 941 for the quarters thereafter through March 31, 1966, and the Internal Revenue Service was required to collect the withholding tax liabilities for those quarters by levying on the firm's bank account on December 20, 1965, and on September 21, 1966 (R. 267a-269a, 300a). However, petitioner continued to refuse to file the Forms 941, even though he regularly received the preprinted forms from the Internal Revenue Service; instead, petitioner deducted income and social security taxes from employees' wages (R. 89a, 270a-271a) but retained the withheld taxes in the firm's bank account and distributed them to himself and the other partners together with the profits from operations (R. 205a). With the exception of four Forms 941 filed after the investigation was under way,[2] none was filed by petitioner for the quarters after April

[1] "R." references are to the printed appendix in the court of appeals.

[2] The Form 941 for the first quarter of 1968 was filed by petitioner shortly after his first interview, on August 26, 1968, with the investigating agent (R. 45a, 59a), and Forms 941 for the last three quarters of 1966 were submitted by petitioner with a check during an interview with the investigating agent on June 29, 1969 (R. 92a).

1, 1964, although the Forms 941 for 1965 were executed for the firm by the Internal Revenue Service in connection with the levy on September 21, 1966 (R. 45a-50a, 62a, 124a, 308a).

Petitioner informed the investigating agent that funds had been available to make timely payment of taxes due for the prosecution periods but that he had been "too busy" (R. 62a, 287a). He also claimed that the prior levies had exceeded the amounts actually due (R. 239a, 300a). Petitioner testified at trial that the partnership had adequate records and funds to make timely payments, and that he had assured the investigating agent that he would "straighten it out" (R. 259a, 270a-271a, 286a-287a). Petitioner's principal defense at trial was that his failure to file was not willful. With respect to the issue of willfulness, the jury was instructed that (R. 374a-375a):

> * * * a wilful failure is one which is voluntary, purposeful, deliberate and intentional as opposed to one which is accidental, inadvertent or careless. * * * An omission or failure to act is wilfully done, as I stated to you before, if done voluntarily and intentionally and with a specific intention to fail to do something the law requires to be done. That is to say, with a bad purpose either to disobey or to neglect or to disregard a legal duty.

At the request of petitioner's counsel (R. 346a-347a, 385a), the jury was also instructed that prior overpayment of tax (through the earlier levies, which petitioner alleged to be excessive) could be considered

on the issue of willfulness (R. 373a). Petitioner made no objection to the court's instructions on willfulness (R. 384a-386a).

1. Petitioner now contends (Pet. 5-7) that the district court's instructions on willfulness denied him a fair trial. However, petitioner's failure to object to these instructions at trial forecloses this contention. Rule 30, Fed.R.Crim.P. In any event, the instructions were correct. The court's instructions with respect to the allegedly excessive levies simply and correctly stated that a prior overpayment does not relieve a taxpayer of his obligation to file a return for subsequent periods.[3] The general instructions with respect to willfulness charged the jury clearly that a failure to file a tax return must be intentional and not merely accidental.[4] This is the prevalent will-

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[3] Petitioner seems to suggest that this instruction prevented the jury from considering his claim that he was "under the impression" the government would prepare his returns. Any relationship between the instruction and such a claim is tenuous at best. Furthermore, petitioner requested no instruction based on such claim. To the contrary, he testified at trial that it had never been suggested to him that the government might prepare his returns (R. 309a).

[4] Petitioner contends (Pet. 6-7) that the appearance of the word "mainly" rather than "namely" in the charge as reported could have confused the jury as to the distinction being drawn between intentional and accidental conduct. Assuming that the judge actually said "mainly", it is nevertheless not clear how that could have misled the jury concerning the substance of the willfulness standard it was to apply. Such inadvertent mis-speaking cannot reasonably be considered misleading (cf. *Hoover* v. *United States*, 358 F. 2d 87 (C.A. 5), certiorari denied, 385 U.S. 822), and the

fulness standard under Section 7203, and it is, if anything, favorable to the defendant. Compare *United States* v. *Platt*, 435 F. 2d 789 (C.A. 2), *United States* v. *Vitiello*, 363 F. 2d 240 (C.A. 3), and *Haner* v. *United States*, 315 F. 2d 792 (C.A. 5) (imposing a standard of intentional conduct),[5] with *Abdul* v. *United States*, 254 F. 2d 292 (C.A. 9) (applying a standard of merely negligent conduct).[6]

2. There is no merit to petitioner's contention (Pet. 7-8) that the evidence did not support the verdict. The evidence showed that petitioner consciously and willingly disregarded his obligation to file federal tax returns. No more is required for proof of a violation of Section 7203. See, *e.g.*, *United States* v. *Schipani*, 362 F. 2d 825, 831 (C.A. 2), certiorari denied, 385 U.S. 934.

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further elaboration of the charge (see *supra*, p. 3) prevented the jury from mistaking the proper standard to be applied.

[5] Although petitioner suggests (Pet. 8-10) that *Platt* and *Vitiello* are in conflict, they in fact apply the same standard. The fact that the Third Circuit in *Vitiello* characterized intentional misconduct as having an "evil motive" (363 F. 2d at 241-242) whereas the courts below speak in terms of "bad purpose" (see *supra*, p. 3) obviously does not represent a disagreement about the substantive meaning of "willfully."

[6] See, also, *United States* v. *Bishop*, No. 71-1698, certiorari granted October 10, 1972, where we support a willfulness standard of intentional conduct for the related tax misdemeanor under 26 U.S.C. 7207.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

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